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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Closed Captioning and Video Description  
of Video Programming

Implementation of Section 305 of the  
Telecommunications Act of 1996

Video Programming Accessibility

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MM Docket No. 95-176

**STATEMENT IN SUPPORT OF NATIONAL ASSOCIATION OF THE DEAF AND  
CONSUMER ACTION NETWORK'S REQUEST FOR RECONSIDERATION OF THE  
CAPTIONING MANDATES**

**UNIVERSITY LEGAL SERVICES - PROTECTION AND ADVOCACY**

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**I. Introduction**

University Legal Services-Protection and Advocacy (ULS-P&A) files this statement of support of the National Association of the Deaf (NAD) and Consumer Action Network's (CAN) Request for Reconsideration of the Federal Communications Commission's (FCC) recent closed captioning requirements. ULS-P&A is the federally mandated protection and advocacy agency for the District of Columbia. As such, ULS-P&A is charged with the responsibility of advocating on behalf of individuals with disabilities residing in the District of Columbia. ULS-P&A submitted comments as part of the Coalition of Protection and Advocacy Systems in response to the Notice of Proposed Rulemaking, released on January 17, 1997.

On August 22, 1997, the FCC released its Report and Order, adopting rules implementing Section 713 of the Telecommunications Act of 1996. NAD and CAN jointly submitted a Request for Reconsideration of the captioning mandates on October 15, 1997, regarding the five percent exemption for all new programming; the exemptions for short advertisements, late night

programming and Spanish language programming; the decision to indefinitely permit the use of electronic newsroom reporting; the decision not to set benchmarks for pre-rule programming; the procedures for handling undue burden requests; and the procedures for achieving compliance with the closed captioning rules. Due to the large number of deaf and hard of hearing individuals residing in the District of Columbia<sup>1</sup> and the great importance that these individuals have access to video programming, ULS-P&A is very concerned about the effect the FCC's recent rules will have on the lives of deaf and hard of hearing individuals. ULS-P&A supports all of NAD and CAN's recommended changes to the FCC's rules, however, we are specifically troubled over the FCC's decision to grant a five percent exemption for all new programming; to exempt short advertisements, late night programming, and Spanish language programming; the decision not to set benchmarks for pre-rule programming compliance; and the FCC's procedures for monitoring compliance with the rules.

## II. We Support NAD and CAN's Assertion that the FCC Lacks the Authority to Grant a Five Percent Exemption

The Telecommunications Act of 1996 states that the FCC's regulations must ensure that "video programming first published or exhibited after the effective date of such regulations is *fully* accessible through the provision of closed captions." The only exemptions permitted under the Telecommunications Act are when the captioning requirements would be economically burdensome, when the requirement would be inconsistent with contracts in effect of the date of the enactment of the Act, and when the requirements would result in an undue burden. 47 U.S.C.

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<sup>1</sup> According to information provided by Vocational Rehabilitation Services for the District of Columbia, Services for the Deaf and Hard of Hearing, there are approximately 43,000 deaf and hard of hearing individuals in the District of Columbia.

§713(d).

Despite the fact that Congress only set forth three ways for providers and owners to be exempt from the closed captioning mandates, the FCC created an additional exemption of five percent of all new video programming. 47 C.F.R. § 79.1(b)(1)(iv). This exemption is clearly in contrast to Congress' intent and it is beyond the FCC's authority to enact such a rule. The FCC's contention that requiring only 95% of new programming is permitted since Congress acknowledged that some new programming would not be captioned is not convincing. Congress knew that all new programming would not be captioned since some of that programming would likely fall within one of the three established exemptions to the captioning mandates.

The FCC also contends that requiring only 95% of new programming to be captioned would ease the burden on distributors that receive programs without captions shortly before scheduled air times, allowing distributors to air programs without seeking last-minute waivers, and will help accommodate occasional technical lapses which may be beyond a distributor's control. We agree with NAD and CAN's assertion that it is common for captioning agencies to handle last minute captioning requests and if last minute requests are a problem, then adjustments need to be made in productions schedules to accommodate the addition of captioning. NAD and CAN's Request for Reconsideration at 4-5 (hereinafter NAD et al.). In addition, we agree with NAD and CAN's suggestion that a video provider could be permitted to transmit a program with captions occasionally when captioning could not be completed due to unforeseen circumstances if the distributor filed a statement with the FCC explaining why the captioning could not be done. Id. at 6.

We also support NAD and CAN's assertion that a 5% exemption is not a de minimis

exemption. NAD et al. at 5. As NAD and CAN demonstrate, this 5% exemption would result in one hour of programming a day being exempt from the captioning requirements. Id. This is a substantial amount of programming that deaf and hard of hearing individuals would not have access to. This five percent exemption would also, as NAD and CAN state, make monitoring extremely difficult since it would be impossible for consumers and the FCC to know which programs have to be captioned. Id. at 6. Therefore, we support NAD and CAN's Request for Reconsideration due to the FCC's lack of authority and the lack of access which would result for deaf and hard of hearing residents of the District of Columbia and throughout the United States.

### III. We Support NAD and CAN's Assertion that Short Advertisements Must Not Be Exempted from the Captioning Requirements

The FCC concluded that advertisements of five minutes duration or less are not included in the definition of programming. 47 C.F.R. §79.1(a)(1). We agree with NAD and CAN that the FCC cannot grant a categorical exemption that is not based on an economic burden. NAD et al. at 7. The FCC contends that it is acceptable to exempt advertisements from the captioning requirement since their are ancillary to the main programming content. As NAD and CAN indicate, the Telecommunications Act does not describe advertisements in this manner and the courts have also recognized the importance of advertisements. Id. at 7- 10. Deaf and hard of hearing individuals have the right to full access and should not have to guess as to the details or the product or service being advertised. As we stated in our previous comments, it is also essential that political advertisements not be exempt from the captioning requirements. Deaf and hard of hearing individuals must have the same right as hearing individuals to information to assist them in deciding which candidates to support. Therefore, we support NAD and CAN's

Request for Reconsideration of a blanket exemption for all advertisers and support their suggestion that only a limited exemption based on economic burden be permitted.

IV. We Support NAD and CAN's Assertion that the FCC's Exemption for Late Night Programming is Overbroad

The FCC exempts from the captioning requirements any programs that are distributed between 2 a.m. and 6 a.m.. 47 C.F.R. §79.1(d)(5). Incorporated in this exemption, is an exemption for video programming providers for any continuous four hour time period, commencing not earlier than 12 a.m. and ending not later than 7:00 a.m.. Id. Exempting four hours of late night programming is excessive, especially when viewed in light with the many other exemptions the FCC granted. In addition to four hours being an excessive amount of time exempt from the captioning requirements, we agree with NAD and CAN's contention that permitting providers to pick and choose which four hours they do not want to caption between the hours of 12:00 a.m. and 7:00 a.m. is clearly not permissible under Section 713. NAD et al. at 11. Although there may be a small number of viewers in the middle of the night, many viewers watch programming close to midnight and in the dawn hours as they prepare for their days.

V. We Support NAD and CAN's Assertion that an Exemption for Spanish Language Programming Should Not be Permitted

Due to the large number of Spanish speaking individuals living in the District of Columbia and throughout the United States, we support NAD and CAN's Request for Reconsideration that Spanish language programming not be exempt from the captioning requirements. NAD et al. at 11-12. As NAD and CAN mention, it is possible to caption such programming and it is essential for deaf and hard of hearing individuals whose primary language

is Spanish to be able to access information. Id. at 13-14. Spanish language programming that is too economically burdensome to caption would be exempt under an existing exemption and therefore, there is no reason to categorically exempt Spanish language programming from the captioning mandates.

VI. We Support NAD and CAN's Assertion that the FCC Should Take Steps to Ensure Compliance with its Mandates for Pre-rule Programs

The FCC has required that 75% of all pre-rule nonexempt programming be captioned by the first quarter of 2008, however, the FCC has chosen not to establish interim benchmarks for this programming. 47 C.F.R. §79.1(b)(2). The FCC presumes that market forces will encourage increased captioning of pre-rule programming. R&O ¶64. We agree with NAD and CAN that these market forces have not encouraged such captioning in the past and that the FCC should require benchmarks be set to ensure this captioning is indeed being done. NAD et al. at 23.

VII. We Support NAD and CAN's Assertion that the FCC's Process for Ensuring Compliance with Captioning Requirements Needs Revision

We agree with NAD and CAN that the FCC needs to make changes to its final rule to achieve effective compliance with its captioning requirements. NAD et al. at 18. We agree with the suggestions described in their Request for Reconsideration to accelerate the complaint process. We especially agree with NAD and CAN's assertion that the FCC should not simply rely on consumer complaints as a means of monitoring compliance with the closed captioning requirements. The FCC needs to impose recordkeeping and reporting requirements on providers, without which consumers will not be able to determine whether a certain provider is in compliance with the captioning requirements. Id. at 19-20. Therefore, we support NAD and

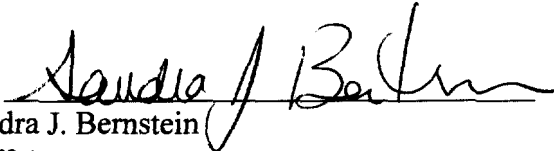
CAN's suggestion that the FCC require all video programming distributors to complete a reporting form quarterly, identifying the station, the programs its captions, and any exemptions it has claimed. Id. at 20.

VIII. Conclusion

For the above-mentioned reasons, ULS-P&A file this statement of support for NAD and CAN's Request for Reconsideration of the captioning mandates.

Respectfully submitted,

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